the conclusion, in the exercise of my discretion, that the applicant should have the custody of the infant. It is relevant to observe that the order for custody made by me would result in the infant living not only with his natural mother but with his natural father as well. No order was made as to costs.

Application allowed.

Solicitors:—*R. Ramason*; *Director of Legal Aid.*

M. GORE v. D. S. GORE

[O.C.J. (Gill J.) August 7, 1963]

[K.L. — Civil Suit No. 156 of 1963]

Family Law —Husband and wife—Separation by mutual consent—Agreement to pay maintenance—Default in monthly payment—Whether enforceable.

This was a claim for arrears in maintenance pursuant to a written agreement entered into by the parties by mutual consent. The defendant admitted entering into the agreement, but contended that he no longer consented to the plaintiff and the children living apart from him and that the agreement was no longer enforceable.

Held: the agreement not having been varied or cancelled by agreement between the parties, and no question of its rectification or cancellation having been raised in the proceedings it was still a valid contract and therefore enforceable by the Court.

MOTION FOR JUDGMENT.

K. Y. Chan (Miss) for the plaintiff.

S. D. K. Peddie for the defendant.

Gill J.: This was a motion for judgment under Order 32 rule 6 of the Rules of the Supreme Court, 1957.

The claim was for $3,000, being the amount due to the plaintiff from the defendant under a written agreement entered into by them on 14th September, 1957 whereby the defendant agreed to pay to the plaintiff the sum of $600 on the 28th day of each month by way of maintenance for herself and the three children of the parties. The amount of $600 a month was paid up to 28th August, 1962, but thereafter default was made in the monthly payments. The claim was for five monthly instalments from 28th September 1962 to 28th February 1963.

In his written statement of defence the defendant admitted entering into the agreement in question by mutual consent but contended that he no longer consented to the plaintiff and the children living apart from him and that in the circumstances the agreement was no longer enforceable. He also contended that one or more of the children were gainfully employed and were therefore no longer in need of maintenance.

It is quite clear that the payment of $600 a month was made under a written agreement which was entered into by the parties by mutual consent. The agreement not having been varied or cancelled by agreement between the parties, it is still a valid contract and therefore enforceable by the Court. So long as the contract is in existence the duty of the Court is to interpret it and not to vary it unless the question of its rectification or cancellation is raised by way of counterclaim or by a separate action.

As there was no counterclaim raised in these proceedings, I felt I had no option but to deal with the agreement as it stood on the date of the motion for judgment. In view of the admission made in the written statement of defence and in view of the fact that regular payments were made under the agreement up to August 1962, I gave judgment for the plaintiff as prayed.

Judgment for the plaintiff.

Solicitors:—*Donaldson & Burkinshaw; Skrine & Co.*

DENG ANAK EKOM v. REGINA

[C.A. (Smith, Simpson & McGilligan JJ.) August 16, 1963]

[Kuching — Criminal Appeal No. 2 of 1963]

Criminal Procedure—Sentence—Age of offender—"If it appears to the Court"—Physical appearance—Assessment of age—Benefit of the doubt—Criminal Procedure Code (Sarawak, Cap. 58), s.219.*

In assessing the age of an accused under section 219 of the Criminal Procedure Code (Sarawak, Cap. 58) the opinion of the trial judge based on the physical appearance of the accused is a proper matter to be taken into consideration, but not a very reliable guide, unless the person assessing the age has any specialised knowledge of the people or the race to which the accused belongs.

Case referred to:—

(1) *Najirullah bin Hajirullah & Anor.* v. *R.* (unreported) Jesselton Criminal Appeal No. 8 of 1961.

COURT OF APPEAL (CRIMINAL).

T. O. Thomas for the appellant.

J. W. Williams (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

The judgment of the Court was delivered by,

Smith J.: The applicant, a young Dayak man, Deng anak Ekom, was convicted of murder by the High Court sitting at Kuching and

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Section 219 of the Sarawak Criminal Procedure Code corresponds to section 256 of Singapore Criminal Procedure Code (Cap. 132). *Cf.* section 16, F.M. Juvenile Courts Ordinance, 1947 as amended.

sentenced to death on the 10th July, 1963. The date of the offence was the 24th March, 1963. The applicant applies for the leave of the Court of Appeal to appeal against the sentence under section 18(1) of the Sarawak, North Borneo and Brunei (Courts) Order in Council, 1951, at page 113 of Volume VI of the Laws of Sarawak, 1958. The section reads as follows:—

"18(1) A person convicted before the High Court may appeal to the Court of Appeal —

(c) with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

The grounds of appeal are as follows:—

"1. The learned trial judge should have exercised his discretion, under section 219 of the Criminal Procedure Code, in favour of your applicant.

2. The learned trial judge should not have ignored the evidence of age given by your applicant.

3. Weight should have been given to the opinion of the assessors at the first trial who considered your applicant to be not quite matured."

Section 219 of the Criminal Procedure Code, Cap. 58 in Volume II of the Laws of Sarawak, 1958 reads as follows:—

"219(1) Sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the Court shall sentence such person to be detained during the pleasure of the Governor...."

This Court wishes to refer to the case of *Najirullah bin Hajirullah and Butokan bin Hajirullah* v. *Reginam* [1] which was decided by a bench consisting of Ainley C.J. as President, and Rogers and Lascelles JJ. In that case the two appellants, who were brothers, were sentenced to death at Tawau for the murder of a Chinese. The appeals of both appellants against conviction were dismissed. The second appellant, Butokan, also appealed against the death sentence passed on him. His ground of appeal was in the following terms:—

"Having regard to the evidence of O. T. Asgali and the unsworn statement of the appellant's mother as to the age of the appellant the learned trial judge should have given the appellant the benefit of the doubt as to the appellant's age."

The question whether the jurisdiction of the Court of Appeal was barred on the ground that the sentence was one fixed by law was not specifically raised in the *Najirullah* case. However, the Court did entertain the appeal and, indeed, quashed the death sentence. It must be assumed that the Court in that case was satisfied that it did have jurisdiction. This Court proposes to follow that precedent and to entertain the appeal against sentence in this case. The hearing of the application is regarded as the hearing of the appeal.

The learned President (Sir John Ainley) said in that case:—

"The question (that is, the question of the age of the accused) may be raised by the Judge himself, by the prosecution or by the defence. Once it is raised, and by whomsoever it is raised, it becomes the duty of the Judge to hear all available evidence on the question, as there is no doubt the learned Judge did here; but when hearing this evidence, and when studying, as he is perfectly entitled to do, the appearance of the convict, he is not, as it seems to this Court, trying an issue between the prosecution and the defence, in which one side asserts and other denies, though the situation may on occasion be indistinguishable to the casual observer from such a trial. The Judge is merely forming an opinion on such material as is available, material which may consist merely of the convict's appearance, and it would be wrong, in the opinion of this Court, to say that an onus lies on the Crown to prove this or that, or that an onus lies on the convict to prove his own age either as a matter of reasonable certainty or as a matter of probability.

If on the material available there is in the Judge's mind any reasonable and substantial doubt as to whether, in view of section 219 of the Criminal Procedure Code, the convict should or should not be sentenced to death, then clearly some risk must be run: the risk of sentencing to death a youth who should not be sentenced to death or the risk of failing to impose on a murderer the penalty the law recognises in his case. Under a system of law based upon English concepts there seems to be no doubt as to the proper course to follow in such circumstances. The convict must have the benefit of the doubt.... This Court considers that it is open to the appellate Court in such circumstances to approach the evidence before the Judge from the correct angle.... To this Court it appears that upon the whole of the evidence before the trial Judge and from the appearance of the appellant a reasonable doubt exists as to whether the second appellant was over the age of eighteen years on the 20th December, 1960. To give effect to this decision this Court sets aside the sentence of death passed on the second appellant and substitutes therefore a sentence that he be detained during the pleasure of the Governor."

The relevant matters in the present case are as follows. Mr. Thomas on behalf of the appellant raised the question of the age of the applicant. The only evidence as to age was that given by the applicant himself, namely, that he was "more or less eighteen years old." Mr. Thomas referred to the accused's behaviour in the witness box. Mr. Abdul Taib, who appeared for the Crown, had no evidence to offer on the question of age. The learned Chief Justice quoted section 219 of the Criminal Procedure Code and said:—

"This test appears to require the Court to come to this conclusion. The accused stated that he is 'more or less 18 years old' and on appearance, I consider he looks to be over 18 years of age. Accordingly, I sentence accused to suffer death by hanging."

Mr. Thomas' argument before this Court was that there was a reasonable doubt as to the accused's age which should be resolved in the accused's favour. Mr. J. W. Williams, Deputy Public Prosecutor, submitted that it was a matter for decision by the trial judge in view of the wording of section 219 of the Criminal Procedure Code. Neither Mr. Thomas nor Mr.

Williams was aware of the Court of Appeal's decision in *Najirullah's* case. I imply no criticism because the judgement has never been published and is not readily available.

Here the question is: "What was the accused's age on the 24th March, 1963?" The accused's evidence that he was more or less eighteen years old should presumably, in view of the ruling that the accused should have the benefit of any doubt, be construed in his favour, namely that he was under eighteen. On the other hand there is the learned Chief Justice's opinion that on the 10th July, 1963, the accused looked to be over eighteen years old. This opinion is presumably based on the physical appearance of the accused, a proper matter to be taken into consideration, but not a very reliable guide, the Court thinks, unless the person assessing the age has any specialised knowledge of the people or the race to which the accused belongs. In view of the expression "he looks to be", with what degree of confidence was this opinion held? — as a certainty, or near certainty or as highly probable, or as an impression merely? The issue for the accused is as serious as it could be, and it appears to this Court that in this case there is a reasonable doubt as to the accused's age on the 24th March, 1963. This Court thinks that the safest course is to quash the death sentence and to substitute a sentence of detention during the Governor's pleasure.

Accordingly this Court sets aside the sentence of death passed on the appellant and substitutes therefore a sentence of detention during the pleasure of the Governor.

Order accordingly.

Solicitors:—*Thomas & Co.*

MAMAT v. ABDUL MANAF

[C.A. (Thomson C.J., Barakbah J.A. and Neal J.) August 21, 1963]

[K.L. — F.M. Civil Appeal No. 23 of 1963]

Damages—Personal injury—Leg—Compound fracture of right tibia and simple fracture of right ulna—Pain and suffering and life-long disability not involving invalidism—Standardization of damages.

In this case the respondent, a 40 year old switchboard attendant, was injured as a result of a collision between a motor-cycle which he was riding and a motor-car driven by the appellant. He suffered (a) compound fracture shaft of right tibia at the junction of the upper and middle 1/3rd resulting in a 1 inch shortening and (b) simple fracture right ulna. The learned trial judge found negligence on the part of the appellant and awarded *inter alia* $15,000 general damages. On appeal, on the question of quantum,

Held: (1) the respondent's loss could be comprised under the heads of pain and suffering and a life-long disability not in any way involving invalidism and not in any way affecting earning power but to some extent affecting amenity and the enjoyment of living;

(2) on the facts and circumstances of this case a suitable sum by way of compensation would be $8,500.

COURT OF APPEAL.

P. J. Mooney for the appellant.

H. E. Cashin (*T. M. Yap* with him) for the respondent.

Thomson C.J. (delivering oral judgment): The respondent to this appeal was injured as a result of a collision between a motor-cycle which he was riding and a motor-car driven by the appellant and he sued for damages in negligence.

The trial Judge found negligence on the part of the appellant and awarded $268.52 special damages and $15,000 general damages.

Against that judgment the appellant has now appealed on the question of liability and on the question of quantum of general damages. I think, however, I am right in saying there is no complaint as to the special damages.

On the question of liability I would dismiss the appeal. On this I find it unnecessary to say more than that I agree with what has been said by the learned trial Judge and it is not necessary to repeat that here.

With regard to the question of general damages, the matter is by no means free from difficulty. As I said a few moments ago on the one hand there is much to be said for some sort of standardization of damages; on the other hand the authorities place considerable limits on our powers to deal with an actual award.

In the present case the physical results of what happened were thus described by a medical witness who saw and examined the respondent about three months after the accident:

"he complained of a limp and weakness of the right leg. I found that he had a 1" shortening of the right leg and also deformity at the fracture side. There is anterior bowing of the right lower leg. This caused the inch shortening. The knee and ankle movements are full and I find that the lateral ligament of the right knee is lax. The knee is not as firm as it should be giving a feeling of instability. The fracture of the forearm has united and there is slight limitation of formation and supination but function is good. He will be able to walk a shorter distance than before. He would have an ache in his leg if he walks too far. He can play badminton but not as well as before."

The only other facts that are relevant are that the respondent is 40 years of age, he is employed as a switch-board attendant by the Central Electricity Board and his employment and earning capacity have apparently not been affected in any way. Moreover he is still able